D.T.E. 99-9

Petition of Eastern Edison Company and Montaup Electric Company for approval by the Department of Telecommunications and Energy of the sale of Montaup Electric Company's 2.89989 percent joint-ownership interest in the Seabrook nuclear generation facility, pursuant to the Restructuring Settlement Agreement, filed and approved in Eastern Edison Company, D.P.U./D.T.E. 96-24 (1997), and pursuant to G.L. c. 164, § 76.

Request by Eastern Edison Company and Montaup Electric Company for a determination by the Department of Telecommunications and Energy that Montaup's interest in the Seabrook nuclear generation facility may be designated an eligible facility pursuant to Section 32 of the Public Utility Holding Company Act of 1935 as amended.

APPEARANCES: David A. Fazzone, Esq.

David A. Fazzone, P.C., and

Doron F. Ezickson, Esq.

Laura S. Olton, Esq.

McDermott, Will & Emery

28 State Street

Boston, MA 02109-1775

FOR: EASTERN EDISON COMPANY

MONTAUP ELECTRIC COMPANY

Petitioner

Thomas F. Reilly

Attorney General

By: Joseph W. Rogers

George Brooks

Assistant Attorneys General

200 Portland Street, 4th Floor

Boston, MA 02114

Nicholas J. Scobbo, Jr., Esq.

Ferriter, Scobbo, Caruso & Rodophele, P.C.

75 State Street, 7th Floor

Boston, MA 02109

FOR: MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

Intervenor

Carlos A. Gavilondo, Esq.

New England Power Company

25 Research Drive

Westborough, MA 01582

Intervenor

John Cope-Flanagan, Esq.

COM/Energy Services Company

One Main Street, P.O. Box 9150

Cambridge, MA 02142-9150

FOR: CAMBRIDGE ELECTRIC LIGHT COMPANY

COMMONWEALTH ELECTRIC COMPANY

CANAL ELECTRIC COMPANY

Intervenor

Stephen Klionsky, Esq.

Western Massachusetts Electric Company

260 Franklin Street, 21st Floor

Boston, MA 02110

FOR: WESTERN MASSACHUSETTS ELECTRIC COMPANY

Limited Participant

TABLE OF CONTENTS

I. INTRODUCTION

On December 23, 1997, the Department of Telecommunications and Energy ("Department") issued its final order in Eastern Edison Company, D.P.U./D.T.E. 96-24 (1997) and approved an offer of settlement ("Restructuring Settlement Agreement") of electric restructuring issues submitted by Eastern Edison Company[(1)] ("EECo") and Montaup Electric Company[(2)] ("Montaup") (collectively "Companies" or "EUA"). On January 7, 1999, the Companies filed with the Department a Petition for Approval of the sale of Montaup's 2.89989 percent joint-ownership interest in the Seabrook nuclear generation facility ("Petition"), located in Seabrook, New Hampshire ("Seabrook") to Little Bay Power Corporation ("Little Bay"), a wholly-owned subsidiary of BayCorp Holdings, Ltd.[(3)] In addition, the Companies request a determination by the Department that Montaup's share of Seabrook may be designated an eligible facility, pursuant to the Public Utility Holding Company Act of 1935 as amended ("PUHCA"), 15 U.S.C. § 79z-5a(c).[(4)]

Pursuant to notice duly issued, the Department conducted a public hearing in this matter at the Department's offices in Boston on February 23, 1999. At the procedural conference conducted immediately following the public hearing, the Attorney General of the Commonwealth ("Attorney General") intervened as of right pursuant to G.L. c. 12, § 11E. The Department granted petitions to intervene by Commonwealth Electric Company, Cambridge Electric Light Company and Canal Electric Company (collectively "COMEnergy"); New England Power Company ("NEP"); and Massachusetts Municipal Wholesale Electric Company ("MMWEC"). In addition, the Department granted the petition for limited participant status of Western Massachusetts Electric Company. An evidentiary hearing in this matter was held on March 25, 1999. The Companies sponsored the testimony of four witnesses: Michael J. Hirsh, vice-president, EUA Service

Corporation and EECo; Kevin A. Kirby, vice-president, EUA Service Corporation, EECo and Montaup; Donald T. Sena, assistant treasurer, EUA Service Corporation and all EUA subsidiary companies, including EECo and Montaup; and John J. Reed, president, Reed Consulting Group. James S. Robinson, vice-president and director of generation investments, testified on behalf of NEP.[(5)] The evidentiary record consists of 65 exhibits, the Companies' responses to one record request and to two post-hearing supplemental record requests as well as NEP's responses to four record requests. The Attorney General filed an Initial Brief and EUA provided a Reply Brief to which the Attorney General submitted a Response Letter. Finally, EUA, the Attorney General, and MMWEC filed responses to supplemental briefing questions.[(6)]

II. DIVESTITURE TRANSACTION

A. Introduction

The proposed divestiture transaction consists of the sale of Montaup's 2.89989 percent joint-ownership interest in Seabrook (Exh. EE-1, at 6). Seabrook is a 1,150 megawatt nuclear generating facility owned by eleven joint owners ("the Joint Owners") located in Seabrook, New Hampshire (id.).[(7)] The Companies propose to sell Montaup's joint-ownership share in Seabrook including all assets, tangible and intangible, that are associated with the plant and in which the Joint Owners have undivided interest, including, but not limited to, Generating Unit I (in commercial operation), Generating Unit II (never completed), and all related real estate, equipment, material, nuclear fuel, books of account, and contract rights (id.). Under the Asset Purchase Agreement and the Nuclear Decommissioning Fund Assignment and Assumption Agreement ("Decommissioning Fund Agreement"), Montaup will pre-fund its share of the decommissioning costs of Seabrook and the buyer will assume all future decommissioning liabilities (id.; Exhs. EE-5, EE-5, exh. C). The Companies note that the proposed transaction satisfies Montaup's commitment under the terms of the Restructuring Settlement Agreement to sell, if possible, their nuclear generation assets and to mitigate stranded costs (Exh. EE-1, at 10). The Companies also note that, in accordance with D.P.U./D.T.E. 96-24, the proceeds from the sale of Montaup's 2.89989 percent joint-ownership interest in Seabrook will be credited to the Reconciliation Account (Exh. EE-3, at 4-5). This credit, in turn, will mitigate Montaup's FERC-approved Contract Termination Charge ("CTC"), which will ultimately result in reductions in retail rates to EECo's customers (id. at 3-7, citing Att. MEC-(DTS-2-EEC) (providing the formula for truing-up Montaup's CTC after the sale of a generating asset)).

B. Description of the Divestiture Process

The Companies note that the auction process to sell Seabrook was identical to the sale and marketing process used to divest Montaup's non-nuclear assets (Exh. EE-1, at 7).[(8)] Specifically, after retaining the assistance of Salomon Smith Barney, the companies conducted an initial marketing effort in July, 1997 by announcing the sale of all their generating assets in a solicitation mailed to over 1,200 persons involved with owning or operating electric generation worldwide (see Exh. EE-3, at 11; Exh. AG-1-16).

Potentially interested persons then executed a confidentiality agreement and received a comprehensive memorandum containing detailed descriptions of each of EUA's generating assets (Exh. AG-1-16). This memorandum included EUA-commissioned studies addressing environmental and engineering issues associated with each asset (id.). Subsequently, the Companies implemented a two-stage divestiture auction. In the first stage, all interested parties submitted indicative, non-binding bids for any or all of EUA's generating assets, including Seabrook (Exh. EE-2, at 11). In the second stage, all bidders with competitive indicative bids submitted binding offers (id.). The Companies analyzed all bids received and, after negotiations, entered into asset-specific purchase and sale agreements with a number of purchasers, including the subject Asset Purchase Agreement (id. at 10-12; Exh. EE-1, at 13-16).

On June 24, 1998, Montaup entered into a purchase and sale agreement whereby Montaup would sell its interest in Seabrook to Little Bay (Exh. EE-1, at 6). In particular, Little Bay agreed to purchase Montaup's 2.89989 percent joint-ownership share in Seabrook for $3,200,000, adjusted for actual balances in inventory and regulatory asset accounts as of the closing (Exh. EE-2, at 3). Under the terms of the agreement, Montaup will remain responsible for its unrecovered investment in the plant, but Little Bay will assume all other existing and ongoing liabilities related to Montaup's Seabrook interest, including the obligation to fund its proportionate share of the decommissioning costs upon the retirement of the unit (EUA Brief at 7). The terms of this transaction are contained in four related agreements: (1) the Asset Purchase Agreement (Exh. EE-5); (2) the Decommissioning Fund Agreement (Exh. EE-5, exh. C); (3) Assignment of Great Bay's interest in the Asset Purchase Agreement to Little Bay (Exh. EE-6); and (4) Great Bay's Guaranty to Montaup of Little Bay's performance under the Asset Purchase Agreement and Decommissioning Fund Agreement ("Guaranty") (Exh. EE-7).[(9)]

Under the Decommissioning Fund Agreement, Montaup will effectively pre-fund the entire decommissioning cost obligation associated with its 2.89989 percent joint-ownership interest (EUA Brief at 7). At the time the Decommissioning Fund Agreement was signed, the estimate before the Nuclear Regulatory Commission ("NRC") and the New Hampshire Nuclear Decommissioning Financing Committee ("NDFC") for the total cost of decommissioning Seabrook at the end of its commercial operating license term in 2026 was $489 million in 1998 dollars (id.). The total decommissioning liability is allocated pro rata among the Joint Owners; Montaup's share of that prospective total liability is 2.89989 percent or $11.8 million (id. at 7-8). On April 12, 1999, NDFC issued a report and order that raised the decommissioning estimate to $513 million (in 1998 dollars), based on the assumption that decommissioning will begin in 2015 instead of 2026 (id. at 7, n. 5). The result of this revised estimate is that Montaup's share of the prospective total liability increased from $11.8 million to $12.379 million (id. at 8).[(10)] As part of this proposed sale, Montaup will transfer to Little Bay its entire right, title and interest in the Seabrook Decommissioning Trust Fund ("Trust Fund"), currently containing approximately $2.4 million, and will prepay into the Trust Fund at closing funds sufficient to increase its balance to $12.379 million (id. at 8). Subsequently, Little Bay will assume and pay all incremental decommissioning obligations attributable to its 2.89989 percent joint-ownership interest in Seabrook (id.).

III. STANDARD OF REVIEW

The Legislature has vested broad authority in the Department to regulate the ownership and operation of electric utilities in the Commonwealth. G.L. c. 164, § 76; Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric Company, D.P.U./D.T.E. 97-111, at 17 (1998); Boston Edison Company, D.P.U./D.T.E. 97-113 (1998). The Department's authority was augmented by the Restructuring Act. Boston Edison Company, D.P.U./D.T.E. 96-23, at 9 (1998). The Restructuring Act requires that each electric company organized under the provisions of Chapter 164 file a plan for restructuring its operations to allow for the introduction of retail competition in generation supply, in accordance with the provisions of G.L. c. 164, § 1A(a). Among other things, the Restructuring Act requires that all restructuring plans contain a detailed accounting of the company's transition costs and a description of the strategy to mitigate those transition costs. Id. One possible mitigation strategy noted in the Restructuring Act is the divestiture of a company's generating units. Id.

In reviewing a company's proposal to divest its generating units, the Department considers the consistency of the proposed transactions with the company's restructuring plan, or in some cases the company's restructuring settlement, and the Restructuring Act. See, e.g., Boston Edison Company, D.T.E. 97-113 (1998); Massachusetts Electric Company, D.P.U./D.T.E. 96-25 (Phase II) (1997); Massachusetts Electric Company, D.P.U./D.T.E. 97-94 (1998); Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric Company, D.T.E. 98-78/83 (1998). A divestiture transaction will be determined to be consistent with a company's restructuring plan or settlement and the Restructuring Act if the company demonstrates to the Department that the "sale process is equitable and maximizes the value of the existing generation facilities being sold." G.L. c. 164, § 1A(b)(1). A sale process will be deemed both equitable and structured to maximize the value of the existing generating facilities being sold, if the company establishes that it used a "competitive auction or sale" that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164, § 1A(b)(2).

The Restructuring Act provides that all proceeds from any such divestiture of generating facilities "that inure to the benefit of ratepayers, shall be applied to reduce the amount of the selling electric company's transition costs." G.L. c. 164, § 1A(b)(3). Where the Department has approved a company's restructuring plan or settlement as consistent or substantially compliant with the Restructuring Act, the Department will approve a company's proposed ratemaking treatment of any divestiture proceeds if the company's proposal is consistent with the company's approved restructuring plan or settlement.

IV. POSITION OF THE PARTIES

A. Attorney General

The Attorney General urges the Department to deny EUA's Petition because the proposed transaction fails to maximize the value of the asset (Attorney General Brief at 12-13).

The Attorney General argues that the financial strength of Little Bay is relevant to whether this sale maximizes the value of Montaup's Seabrook asset (id. at 10). The Attorney General states that the realization of the main benefit of this transaction (i.e., the assignment of responsibility for all future Seabrook costs to the buyer) may not materialize if the buyer is not able to fulfill these responsibilities (id.). Such a situation would reduce the value of this sale, because Massachusetts ratepayers may ultimately be held responsible for costs that EUA claims are mitigated through this transaction (id. at 12-13). With specific reference to the operation of New Hampshire Senate Bill 140[(11)] ("SB 140"), the Attorney General avers that a default by Little Bay could result in incremental costs to Massachusetts ratepayers even if EECo's ratepayers are no longer responsible for these costs due to this transaction (Attorney General Brief at 12). Accordingly, although he recognizes that the Department and/or the FERC must approve any proposed pass-through of incremental decommissioning expenses, the Attorney General contends SB 140 creates a contingent liability for Massachusetts ratepayers which requires the Department to deny the proposed transaction as not in the public interest (Attorney General Answer at 2-3).

The Attorney General also argues that EUA mischaracterizes his position (Attorney General Response Letter at 1). Responding to the EUA statement that Little Bay and Great Bay are New Hampshire corporations not subject to the Department's jurisdiction, the Attorney General states that the General Court has directed the Department to examine whether a proposed sale maximizes the value of an asset regardless of the buyer's jurisdiction or where the asset is located (id. at 2-3). According to the Attorney General, this directive requires the Department to examine, for example, the financial qualification of a potential buyer of a utility's asset (id.).

Finally, the Attorney General argues that Montaup will not be relieved of its obligations under the JOA unless the other Joint Owners provide their consent to the transaction (Attorney General Answer at 4). According to the Attorney General, such consent is necessary unless the transfer is to: (1) an affiliate company or trust; or (2) in connection with a "consolidation or acquisition of substantially all of the properties or generating facilities of a Participant . . ." (id. citing JOA ¶¶ 25.1, 32.5 and DTE SUPP-RR-2). The Attorney General argues that Montaup's sale of its 2.89989 percent joint-ownership share of Seabrook does not fall into either exception and accordingly this transfer does require the approval of the other Joint Owners before Montaup may be relieved of its obligations under the JOA (id. at 4).

The Attorney General did not discuss the Companies' request for a determination by the Department that Montaup's interest in Seabrook may be designated an eligible facility pursuant to 15 U.S.C. § 79z-5a(c).

B. EUA

EUA asserts that it has succeeded in maximizing the value for Seabrook by designing and implementing an fair and open bidding process (EUA Brief at 21-23; Exh. EE-2, at 11). They argue the process was fair and open because (1) participation was encouraged

through the non-binding nature of the first stage of the auction process, enabling more potential buyers to be involved in the auction process, (2) a broad range of potential purchasers were contacted, serving to further secure the maximum number of offers, (3) confidentiality was strictly enforced, ensuring fair and honest bidding, and (4) complete information was made available to all bidders throughout the two-stage auction process, ensuring optimized knowledge for potential buyers (EUA Brief at 21-23; Exh. EE-2, at 11-12). EUA Service Corporation personnel were active during all stages of the process, assembling documents, reviewing transaction-related materials, giving technical presentations, and answering bidder questions (Exh. EE-2, at 12).

EUA states that the divestiture of Montaup's joint-ownership share of Seabrook is consistent with Article 6.1.2 of its Restructuring Settlement Agreement which states, "[a]s part of the divestiture, Montaup will endeavor to sell, lease, assign, or otherwise dispose of its minority ownership shares of nuclear units on terms that will assign the ongoing operating costs and responsibility to a non-affiliated third party" (EUA Brief at 4-6, 6 n.4). EUA also argues that the divestiture is consistent with the Restructuring Act by citing evidence that the auction process used to sell Montaup's joint-ownership share of Seabrook ensured complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate and thus, that the auction produced the maximum value of the assets being sold (id. at 21-23). For these reasons, EUA argues that the Department should approve the sale (id. at 12).

Regarding the financial viability of Little Bay, EUA argues that the Department does not have jurisdiction to consider the financial qualifications of the purchaser of Montaup's joint-ownership interest in Seabrook (id. at 11). EUA states that the NRC has been given the specific responsibility of reviewing the financial qualifications of a purchaser of an interest in a nuclear facility before allowing the transfer to take place (id. at 12). In addition, EUA claims that because Great Bay and Little Bay are New Hampshire corporations and, thus "foreign entities, owning interests in a generation facility located in another state," the Department cannot, as a matter of law, exercise jurisdiction over them (id. at 15).

With specific reference to the operation of SB 140, EUA provides a sample calculation of how Little Bay's potential obligation, in the event of a default by Great Bay, could be passed on to Massachusetts ratepayers (EUA Answer at 1).[(12)] EUA states that it does not believe that the New Hampshire legislation abrogates the Department's authority to review any pass-through to Massachusetts ratepayers for any potential decommissioning liability that results from a default by Great Bay (id. at 2).

EUA also argues that its proposed transfer to Little Bay does not require approval of the other Joint Owners (id. at 2-3). EUA contends that the proposed sale falls under the exception clauses of the JOA, which would relieve Montaup from obtaining the approval of the other joint owners before the sale can be completed (id. at 3, citing DTE SUPP-RR-1).

Finally, EUA requests that the Department make the necessary findings so that Montaup's joint-ownership interest in Seabrook can be designated as an eligible facility under Section 32 of PUHCA, as amended, in order to eliminate the need to obtain approval from the Securities and Exchange Commission under Section 12(d) of PUHCA to sell the asset (EUA Brief at 23). The Companies argue that such a designation: (1) will benefit consumers, (2) is in the public interest, and (3) does not violate state law (id. at 25).

C. NEP

NEP testified that the obligation to decommission Seabrook would fall on the remaining joint owners in the event that Little Bay defaults on its decommissioning obligation (Exh. NEP-1, at 4). In lieu of an initial brief, NEP submitted a letter stating that it was in settlement discussions with Little Bay (NEP April 9 Letter at 1). Without further commenting on the proceeding, NEP opined that the Department has authority "to consider the financial qualifications of a prospective joint owner of Seabrook . . . for purpose of determining the public interest and the potential economic effect of the transaction on Massachusetts customers (id. citing Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 205-07 (1983)). As noted above in footnote five, NEP reached a settlement with Little Bay and withdrew from this proceeding (NEP April 14 Letter at 1).[(13)] In its withdrawal letter, NEP formally stated that it did not oppose the prospective acquisition by Little Bay of Montaup's 2.9 percent share of Seabrook (id.).

D. MMWEC

MMWEC only addresses its own ratemaking authority. MMWEC states that its ratemaking authority is not under the jurisdiction of the Department (MMWEC Answer at 2). Therefore, in the event of a default by Great Bay, if MMWEC incurred additional costs, those costs would be passed on, via power sales agreements, to the municipal light departments participating in Seabrook (id.).

Furthermore, MMWEC disputes EUA's claim that the proposed sale falls under the exception clauses of the JOA that would exempt it from approval by the other Joint Owners (id. at 3). Rather, MMWEC states that the proposed sale requires the express release of each of the Joint Owners to relieve Montaup of its responsibilities under the JOA (id. at 3-4).

V. ANALYSIS AND FINDINGS

As stated above, the Restructuring Act provides that a sale process will be deemed equitable if the company establishes that it used a "competitive auction or sale" that ensured "complete, uninhibited, non-discriminatory access to all data and information by any and all interested parties seeking to participate in such auction or sale." G.L. c. 164, § 1A(b)(2). The record establishes that EUA: (1) informed potential bidders of the pendency of the sale;

(2) provided interested parties with a detailed description of the generation portfolio;

(3) provided interested parties with the preliminary terms of sale, a proposed purchase and sale agreement, and an overview of the bidding process; and (4) allowed access by qualified bidders to the data room, thereby facilitating due diligence inquiries (Tr. at 46-49).

Based on the above evidence, the Department finds that the process used by EUA to divest Montaup's 2.89989 percent joint-ownership interest in Seabrook ensured complete, uninhibited, non-discriminatory access to all data and information by all parties seeking to participate in the auction, and therefore was equitable. The Department notes that the Companies have used this same process to divest other generating assets, and that the Department previously approved this process as consistent with the divestiture requirements imposed by G.L. c. 164, §§ 1A(b)(1) and (2), the Companies' Restructuring Settlement Agreement, and the FERC in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000. Eastern Edison Company and Montaup Electric Company, D.P.U./D.T.E. 97-105, at 14 (1999).

Regarding the requirement that EUA maximize the value of the assets sold, the Department notes that the Companies employed several measures in its divestiture process to ensure that Seabrook was sold at the highest possible price. First, confidentiality was maintained throughout the process; only EUA knew the number or identity of the bidders. Second, EUA conducted confidential discussions with the highest bidder from the auction. This enabled the selection of the bid that provided the highest overall value to ratepayers on a fully comparable basis.

The Department recognizes that the primary source of claimed benefits to ratepayers from this divestiture transaction result not from cash proceeds, but rather from the avoidance of future operational and decommissioning-related liabilities. For EUA's ratepayers, the divestiture transaction involves the elimination of future risk associated with the continued operation of Seabrook, including the future risk of changes in Seabrook's decommissioning costs. The Department disagrees with the Attorney General's suggestion that we reject this proposed transaction because a default by Little Bay may result in incremental costs for non-EUA ratepayers in Massachusetts by operation of SB 140. No party, including EUA, argues that New Hampshire's legislation operates to abrogate our authority (or, we note, the authority of the FERC). Accordingly, any collection of incremental costs from non-EUA ratepayers is both speculative (i.e., no such cost recovery may ever be sought) and uncertain (i.e., cost recovery, if requested, may not be approved).[(14)] The Attorney General's concerns are insufficient to overcome the tangible, immediate benefits accruing to EUA's ratepayers as a result of this transaction. We note that the Companies have proposed to credit all revenues from this transaction to Montaup's Reconciliation Account. Because this credit will mitigate Montaup's FERC-approved CTC and result in reduced transition costs for EECo's ratepayers, we conclude that the Companies' proposed ratemaking treatment of these divestiture proceeds is consistent with their Restructuring Settlement Agreement and G.L. c. 164, § 1A(b)(3).

The Attorney General argues that we have jurisdiction to consider the financial viability of Little Bay. However, we have previously found that "a company's financial qualifications to own and operate a nuclear plant in a safe and reliable manner, are within the jurisdiction of the NRC." Boston Edison Company, D.T.E. 98-119/126, at 29-30 (1999). We see no compelling reason to depart from that rule here. The NRC will not authorize the transfer of the Montaup's share of the plant unless it finds that Little Bay is financially qualified to operate the plant. The NRC requires an applicant for a nuclear power plant operating license to demonstrate its financial qualifications to carry out the activities associated with such license. 10 C.F.R. § 50.33. Specifically, 10 C.F.R. § 50.33(f)(3) requires that each applicant for a nuclear license submit the following: "(i) the legal and financial relationships it has or proposes to have with its stockholders and owners; (ii) its financial ability to meet any contractual obligations to the entity which they have incurred or proposed to incur; and (iii) any other information considered necessary by the [NRC] to enable it to determine the applicant's financial qualification." In addition, the NRC may request additional or more detailed information with respect to an applicant's ability to continue to conduct of the activities authorized by the license and to decommission the facility. 10 C.F.R. § 50.33(f)(4).

Finally, some parties questioned whether the JOA requires the Joint Owners to approve this transaction. The Department does not need to decide this issue as it is a matter to be settled (or litigated) among the Joint Owners. The Department finds that the interpretation of the JOA is a private matter that has no bearing on the Department's decision to approve or deny this proposed sale.

Based on the discussion and the evidence noted above, the Department finds that the Companies have demonstrated that the sale process used here was "equitable and maximize[d] the value of the existing generation facilities being sold" as required by G.L. c. 164, § 1A(b)(1). In addition, the Department finds that this proposed transaction is consistent with the Companies' Restructuring Settlement Agreement approved by the Department in D.P.U./D.T.E. 96-24, and by the FERC in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000. Finally, the Department finds that this proposed transaction is consistent with the terms of the Companies' divestiture plan approved by the Department in D.P.U./D.T.E. 97-105. Accordingly, the Department hereby grants the Companies' Petition for approval of the sale of Montaup's 2.89989 percent joint-ownership interest in the Seabrook nuclear generation facility.

As noted above in Section IV, no party has questioned EUA's request that Montaup's joint-ownership share of Seabrook be designated as an eligible facility pursuant to Section 32 of PUHCA. The Department, as a state commission with retail rate authority over EECo, has reviewed the Company's books and records relating to Seabrook. The Department notes that Little Bay, an EWG, is purchasing Montaup's interest in Seabrook in order to own it as an eligible facility pursuant to 15 U.S.C. § 79z-5a(a)(1), with its purchase price reflecting that expectation.

Based on the fact that the expectation of eligible facility status underlies the purchase price which mitigates transition costs to be paid by ratepayers, the Department finds that

designation of the requested facility as an eligible facility will benefit customers. In addition to benefitting customers, the Department has concluded that the proposed transfer of this Seabrook interest to Little Bay is consistent with the public interest as required by G.L. c. 164. Therefore, the Department finds that designation of this interest as an eligible facility is in the public interest.

Finally, the Department previously has approved EECo's divestiture process as satisfying the requirements of the Restructuring Act. D.P.U./D.T.E. 97-105. We note that the Restructuring Act was designed to foster, inter alia, a competitive electric generation industry, and that competing wholesale generators are an integral part of that industry's structure. Thus, the Department finds that the designation of the subject share of Seabrook as an eligible facility does not violate state law, but rather, furthers the objectives of state law. Accordingly, based on the Department's broad authority to regulate the ownership and operation of electric facilities in the Commonwealth pursuant to, but not limited to, G.L. c. 164, §§ 76 (general supervisory power), 80 and 85 (access to books and records), 1B and 93 (jurisdiction over rates), and 94G (performance reviews of generating units), we aver that we have sufficient regulatory authority, resources, and access to books and records to exercise our duties, and based on our review of the entire record in this proceeding, we conclude that the designation of the subject joint-ownership interest in Seabrook as an eligible facility, as defined in section 32 of PUHCA (as amended by the Energy Policy Act of 1992), (1) will benefit customers, (2) is in the public interest, and (3) does not violate state law.

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is hereby

ORDERED: That the asset divestiture involving the sale by Eastern Edison Company and Montaup Electric Company of Montaup Electric Company's 2.89989 percent joint-ownership share in the Seabrook nuclear generation facility to Little Bay Power Corporation, as embodied in the Asset Purchase Agreement and other related documents, is approved; and it is

FURTHER ORDERED: That Montaup Electric Company's 2.89989 percent joint-ownership share in the Seabrook nuclear generation facility be granted eligible facility status pursuant to 15 U.S.C. § 79z-5a(c).

By Order of the Department,

_____

Janet Gail Besser, Chair

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Eastern Edison Company is wholly-owned subsidiary of Eastern Utility Associates, Inc.

2. Montaup Electric Company is a wholly-owned subsidiary of Eastern Edison Company. Eastern Edison Company & Montaup Electric Company, D.P.U./D.T.E. 97-105, at 1, n. 2 (1999).

3. Montaup agreed to sell its Seabrook interest to Great Bay Power Corporation ("Great Bay"), a New Hampshire corporation wholly-owned by BayCorp Holdings, Ltd., and a current joint owner of 12.1324 percent of Seabrook (Petition at 1, n.1). On August 28, 1998, Great Bay entered into an Assignment Agreement with Little Bay, a new affiliate, whereby Great Bay assigned all of its right, title and interest in the Asset Purchase Agreement to Little Bay (Exh. EE-6).

4. Section 79z-5a(a)(1) of Title 15 of the United States Code defines an exempt wholesale generator ("EWG") as any person who is "exclusively in the business of owning, operating, or both owning and operating all or part of one or more eligible facilities and selling electric energy at wholesale." Further, an eligible facility is used for the "generation of electric energy exclusively for sale at wholesale." 15 U.S.C. § 79-5a(a)(2)(A). 15 U.S.C. § 79z-5a(c) requires a state commission to have made three specific determinations before the Federal Energy Regulatory Commission ("FERC") may designate an existing facility an eligible facility: (1) such designation must benefit consumers; (2) such designation must be in the public interest; and (3) such designation must not violate state law.

5. As explained more fully below in Section IV.C., NEP intervened for the sole purpose of challenging the wherewithal of Little Bay to fulfill the financial responsibilities required of an owner of a nuclear facility. On April 14, 1999, NEP advised the Department that it had reached a settlement with Little Bay. Accordingly, NEP withdrew from the proceeding and stated that it did not oppose the prospective acquisition by Little Bay of Montaup's 2.9 percent share of the plant (NEP April 14, 1999 Letter at 1).

6. The two supplemental briefing questions asked:

(1) please discuss in detail if and/or how New Hampshire Senate Bill 140, effective on June 11, 1998, operates to create a contingent liability for decommissioning expenses for Massachusetts' ratepayers. What is your view of the argument that the New Hampshire legislation abrogates the authority of the Department to review and approve cost recovery from Massachusetts' ratepayers? What about for ratepayers of municipal light departments either via a direct ownership interest such as Hudson Light and Power or Taunton Municipal Light Department, or via membership in Massachusetts Municipal Wholesale Electric Company? Please attach copies of all cited statutes, judicial opinions, and other referenced materials; and

(2) with specific reference to the Joint Owners Agreement for the Seabrook nuclear power plant, please discuss in detail whether consent from all the current joint owners is required before the sale of Montaup Electric Company's 2.89989 percent interest to Little Bay Power Corporation may be completed?

7. The current ownership of Seabrook consists of the following entities: COMEnergy (3.5 percent), Montaup (2.9 percent), Great Bay (12.1 percent), Hudson Light and Power (0.1 percent), MMWEC (11.6 percent), NEP (10.0 percent), New Hampshire Electric Cooperative (2.2 percent), North Atlantic Energy Corporation (35.9 percent), Taunton Municipal Light Department (0.1 percent), The Connecticut Light & Power Company (4.1 percent) and United Illuminating Corporation (17.5 percent). The legal relationship among all joint owners concerning their responsibilities for, and management of, Seabrook is specified in the Joint Ownership Agreement ("JOA"). North Atlantic Energy Services Corporation, a subsidiary of Northeast Utilities, has exclusive responsibility for the management, operation and maintenance of Seabrook pursuant to contract with the Joint Owners (Exh. EE-2, at 5).

8. Montaup previously described its plans for implementing generation divestiture in filings made in July and November, 1997. The Department approved this divestiture plan in Eastern Edison Company & Montaup Electric Company, D.P.U./D.T.E. 97-105, at 14 (1999). Consistent with the terms of the plan, Montaup sent out early interest letters which included instructions to guide persons interested in seeking additional information, or wishing to participate in the bidding process. Similar information was also posted on EUA's website (Exh. EE-3, at 11). See D.P.U./D.T.E. 97-105, at 13.

9. Great Bay has provided Montaup with an irrevocable and unconditional Guaranty of Little Bay's performance of its obligations under the Asset Purchase Agreement and the Decommissioning Fund Agreement (Exh. EE-7, at 1). This Guaranty will remain in effect

until such time as all of the obligations contained within the Asset Purchase Agreement and the Decommissioning Fund Agreement have been satisfactorily discharged (id.).

10. ($513 million/$489 million) x $11.8 million = $12.379 million

11. New Hampshire Senate Bill 140, § 164:2(II) provides that "[t]he joint owners of [Seabrook] shall be proportional guarantors of the decommissioning obligations of any joint owner of the facility without a franchise territory."

12. See footnote 9, supra. EUA notes that 100 percent of a Little Bay default is passed, pursuant to the terms of the Guaranty, to its affiliate Great Bay. EUA's sample calculation demonstrates that a $100,000,000 deficiency in the Trust Fund would translate into an incremental liability of approximately $89,700 for electric companies serving customers in Massachusetts (EUA Answer at 1-2).

13. [13] According to the settlement, Little Bay has agreed to undertake certain financial commitments throughout the period that NEP owns its share of Seabrook.

14. We note SB 140 is but one part of a comprehensive statutory scheme by which New Hampshire regulates the decommissioning trust funds of in-state nuclear generation facilities. A default by Little Bay on its decommissioning obligation does not automatically result in incremental costs for the remaining Joint Owners. As provided by SB 140, § 164:2(IV): "If a joint owner of [Seabrook] . . . defaults on its decommissioning obligations, the [nuclear decommissioning finance] committee shall require the remaining owners . . . to submit for the committee's approval a plan for the fulfillment of the defaulting owner's decommissioning obligations. . . . The plan may include the sale of the defaulting owner's share of the power generated by the facility, and the application of the proceeds of such sale to the defaulting owner's decommissioning obligations." SB 140, § 164:2(V) authorizes the nuclear decommissioning finance committee to prepare a plan for recovering the decommissioning costs in default in the event the remaining owners do not.